



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT MALINDI**

**ELC LAND CASE NO. 201 OF 2017**

**FLORENCE MARIGA LUGANJE.....PLAINTIFF**

**VERSUS**

**JAMES BIDII.....1<sup>ST</sup> DEFENDANT**

**MOMBASA PENTERCOSTAL CHURCH, KILIFI BRANCH.....2<sup>ND</sup> DEFENDANT**

**NATIONAL ENVIRONMENT MANAGEMENT AUTHORITY.....3<sup>RD</sup> DEFENDANT**

**RULING**

1. By this Notice of Motion application dated and filed herein on 19<sup>th</sup> March 2018, Florence Mariga Luganje (the Plaintiff) prays that a warrant of arrest be issued against the 1<sup>st</sup> Defendant-James Bidii for him to be brought to Court to show cause why he should not be committed to civil jail for disobeying the Court Orders issued herein on 19<sup>th</sup> October 2017.

2. It is the Plaintiff's case that the 1<sup>st</sup> Defendant was on 15<sup>th</sup> December 2017 served with the said orders requiring him and his servants or agents not to play their musical instruments at MPC Kilifi Church until the suit is heard and determined. The 1<sup>st</sup> Defendant however disobeyed the said orders and continued to play the instruments even louder than before the orders were served. The Plaintiff accordingly prays that in order to preserve the honour and dignity of the Court, the 1<sup>st</sup> Defendant be punished accordingly.

3. But in his Replying Affidavit sworn and filed herein on 13<sup>th</sup> April 2018, the 1<sup>st</sup> Defendant denies that he was served on 15<sup>th</sup> December 2017 as alleged and asserts that he only became aware of the Courts orders when he was served therewith attached to the present application. The 1<sup>st</sup> Defendant further denies that the 2<sup>nd</sup> Defendant church played very loud music as stated by the Plaintiff.

4. The 1<sup>st</sup> Defendant further avers that immediately they became aware of the Court Orders they arranged for a meeting with the Plaintiff and her family whereupon they agreed on measures to contain the sound including a requirement that they erect a wall around the 2<sup>nd</sup> Defendant church premises. It is his case that they have since gone ahead and erected a wall as was required.

5. I have considered the application and the response thereto. I have also considered the written submissions and the authorities to which I was referred by the Learned Advocates for the parties.

6. This suit was filed against the three Defendants on 12<sup>th</sup> October 2017. Filed contemporaneously with the suit was a Notice of Motion application dated the same day. When the Motion was placed before this Court under Certificate of urgency on the very day it was filed, the Court declined to grant any orders and directed that it be served for inter-partes hearing on 19<sup>th</sup> October 2017.

7. On the date fixed for hearing, there was no appearance by the Respondent and upon perusal of an Affidavit of Service filed by the Plaintiff on 18<sup>th</sup> October 2017, the Court proceeded to allow the application as it was shown therein that the Respondents had been served. The subsequent orders extracted from those proceedings restrained the Respondents from playing their musical instruments in their building at MPC Church Kilifi until such a time that this suit would be heard and determined.

8. According to the Plaintiff, the 1<sup>st</sup> Defendant was personally served with those orders on 15<sup>th</sup> December 2017 but instead of obeying the same, he proceeded to play the musical instruments in their church area even louder thereby interfering with the Plaintiff's quiet enjoyment of her neighbouring house and denying her the peace to study for her examinations at Pwani University.

9. The 1<sup>st</sup> Defendant denies that he was served as alleged or at all. It is his case that he only came to learn of the Orders when he was served with the present application accusing him of being in contempt of the court orders.

10. The essence of the power to punish for contempt is to ensure that the dignity and authority of Courts is maintained. Obedience to Court Orders ensures that there is law and order in society. Being quasi-criminal in nature however the Court must satisfy itself that before it metes out any punishment to an individual, there is evidence that the said individual was aware of and deliberately chose to disobey the said orders.

11. In the matter before me, the Plaintiff asserts that the 1<sup>st</sup> Defendant was personally served with the said orders on 15<sup>th</sup> December 2017 and that he chose to disobey the same. According to the Plaintiff, the Summons to Enter Appearance were earlier on 17<sup>th</sup> October 2017 served personally upon the 1<sup>st</sup> Defendant and it was the same Process Server who again served the 1<sup>st</sup> Defendant with the restraining orders.

12. I have taken a serious look of the record herein given the 1<sup>st</sup> Defendant's protestations of non-service. From the said record, it is clear from the Affidavit of Service of Samson B Kimbeja, a Process Server who served the summons, and which affidavit was filed herein on 19<sup>th</sup> March 2018 that he visited the church on 19<sup>th</sup> October 2017 but was not able to find the 1<sup>st</sup> Defendant. The Process Server avers at paragraph 3 thereof that in the absence of the 1<sup>st</sup> Defendant, he served the Court Order upon a Caretaker of the Church known by the name Thomas.

13. However, at Paragraph 4 of the same affidavit, the Process Server again avers that on 15<sup>th</sup> December 2017 at 4.40 p.m, he visited the Church premises again and found the 1<sup>st</sup> Defendant whom he served with the Court order dated 19<sup>th</sup> October 2017. It is the Process Server's case that the 1<sup>st</sup> Defendant declined to sign the documents.

14. As it were, I was not persuaded that the Process Server having served the Court Order on the Church's Caretaker one Thomas still had a valid and original order from the Court which could validly be served upon the 1<sup>st</sup> Defendant two months later on 15<sup>th</sup> December 2017.

15. Given that the 1<sup>st</sup> Defendant had already received the earlier summons, signed them and that steps had already been taken to approach the Plaintiff for an amicable settlement of the dispute, I did not see why the 1<sup>st</sup> Defendant would at this second stage refuse to sign documents and/or to acknowledge service thereof. It is indeed evident that when again he was served with the application for contempt, he received and acknowledged the same.

16. In the circumstances, I shall allow the 1<sup>st</sup> Defendant the benefit of the doubt and decline to issue warrant of arrest against him as sought herein.

17. The application dated 19<sup>th</sup> March 2018 is accordingly dismissed. The costs shall be in the cause.

**Dated, signed and delivered at Malindi this 11<sup>th</sup> day of July, 2019**

**J.O. OLOLA**

**JUDGE**